

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

MARK ANTHONY ORTEGA

Plaintiff,

v.

CARLOS HERRERA AND FUNDQUBE INC.
D/B/A FUNDQUBE,

Defendants.

Case No. 5:24-cv-00769-XR

FILED

AUG 15 2024

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY KKJ DEPUTY

PLAINTIFF'S MOTION FOR ALTERNATIVE SERVICE OF PROCESS

Plaintiff Mark Anthony Ortega ("Ortega") files this Motion for Alternative Service of Process, asking the Court for an order authorizing alternative service of process upon Defendants Carlos Herrera and Fundcube Inc. D/B/A FundQube ("Defendants") due to difficulties encountered in traditional service.

INTRODUCTION

1. Ortega brought this action for violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227, et seq. ("TCPA"), and the Texas Business and Commercial Code, Chapter 302 ("Tex. Bus. & Com. Code") arising out of Defendants' practices of initiating unwanted and unsolicited telemarketing calls.

2. Despite Plaintiff's diligent efforts, traditional service of process upon Defendants has proven unsuccessful due to the address being gated along with the presence of an aggressive dog behind said gate, accompanied by a "beware of dog" sign, creating a hostile environment for the process server.

3. Therefore, Plaintiff requests this Court to authorize alternative service by posting the documents to the gate at Defendants' address.

FACTUAL BACKGROUND

4. Beginning on or around June 20, 2024, Plaintiff received multiple telemarketing calls from Defendant FundQube to Plaintiff's cellular telephone, 210-744-XXXX, in violation of the TCPA and Texas Business & Commercial Code.

5. Plaintiff filed his First Amended Complaint in this matter on July 18, 2024.

6. On July 27, 2024, Plaintiff retained a private process server to personally serve Defendant Carlos Herrera at their last known address and FundCube Inc. at its registered agent's address, both located at 1207 13th ST, Imperial Beach, CA 91932.

7. As noted in the attached Exhibits "A" and "B", On July 29, 2024, the process server attempted service; however, was unable to deliver the documents due to a hostile environment. A large dog was at the residence, and "beware of dog" images were present, preventing the process server from safely approaching the residence.

ARGUMENT AND AUTHORITIES

8. Federal Rule of Civil Procedure 4(e)(1) permits service of process in accordance with the law of the state where the court is located or where service is made. Texas Rule of Civil Procedure 106(b) authorizes alternative service when service through the methods prescribed by Rule 106(a) has been attempted but unsuccessful. *See* Tex. R. Civ. P. 106(a), (b).

9. In this case, Plaintiff has diligently pursued traditional methods of service, as evidenced by the Proof of Service documenting the process server's attempts to personally serve Defendants at their address. Despite these efforts, service was thwarted by the hostile environment for the process server.

10. This situation presents a justifiable need for alternative service under Rule 106(b). The obstacles encountered by the process server render traditional service impractical and potentially dangerous.

11. Moreover, Plaintiff proposes alternative service methods reasonably calculated to provide Defendants with actual notice of this lawsuit:

a. **Affixation to the Gate at Defendants' Address:** This method provides notice when delivery to a person at the residence is unsuccessful.

CONCLUSION

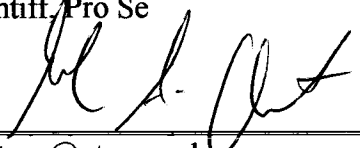
12. For the foregoing reasons, Plaintiff respectfully requests that the Court grant this Motion for Alternative Service of Process and authorize service upon Defendants through the following method:

a. Affixation of a copy of the Summons, Complaint, and this Order to the gate at 1207 13th ST, Imperial Beach, CA 91932

Dated: August 13, 2024

Respectfully submitted,

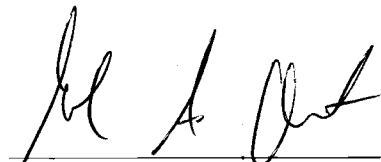
Mark Anthony Ortega
Plaintiff/Pro Se

By: 
morteaga@utexas.edu
PO Box 702099
San Antonio, TX 78270
Telephone: (210) 744-9663

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2024, a true and correct copy of the foregoing Plaintiff's Motion for Alternative Service of Process was served upon Defendant Carlos Herrera via Certified Mail, Return Receipt Requested, postage prepaid, to the following address:

Carlos Herrera
1207 13th ST,
Imperial Beach, CA 91932

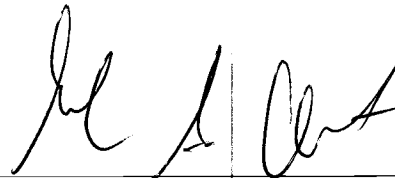


Mark Anthony Ortega

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2024, a true and correct copy of the foregoing Plaintiff's Motion for Alternative Service of Process was served upon Defendant FundCube Inc., D/B/A/ FundQube via Certified Mail, Return Receipt Requested, postage prepaid, to the following address:

FundCube Inc., D/B/A/ FundQube
1207 13th ST,
Imperial Beach, CA 91932

A handwritten signature in black ink, appearing to read 'Mark Anthony Ortega', written over a horizontal line.

Mark Anthony Ortega

Exhibit A

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No. **5:24-cv-00769-XR****PROOF OF SERVICE***(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (f))*

This summons for **Carlos Herrera**
was recieved by me on **7/27/2024**:

- ☐ I personally served the summons on the individual at *(place)* on *(date)* ; or
- ☐ I left the summons at the individual's residence or usual place of abode with *(name)* , a person of suitable age and discretion who resides there, on , and mailed a copy to the individual's last known address; or
- ☐ I served the summons on *(name of individual)* , who is designated by law to accept service of process on behalf of *(name of organization)*; or
- ☒ I returned the summons unexecuted because **Other contact after attempting service at 1207 13th St, Imperial Beach, CA 91932; or**
- ☐ Other *(specify)*

My fees are \$ 0 for travel and \$ **75.00** for services, for a total of \$ **75.00**.

I declare under penalty of perjury that this information is true.

Date: **07/30/2024**



Server's signature

Alejandra Salcido

Printed name and title

**602 myra avenue
chula vista, CA 91910**

Server's address

Additional information regarding attempted service, etc:

7/29/2024 3:19 PM: I was unable to deliver the documents due to a hostile environment. Also A huge dog was at the residence and beware of dog images



Tracking #: 0139076322



Exh. 5A "B"

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No. **5:24-cv-00769-XR**

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

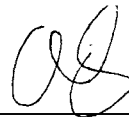
This summons for **FundCube Inc.**
was recieved by me on **7/27/2024**:

- ☐ I personally served the summons on the individual at *(place)* on *(date)* ; or
- ☐ I left the summons at the individual's residence or usual place of abode with *(name)* , a person of suitable age and discretion who resides there, on , and mailed a copy to the individual's last known address; or
- ☐ I served the summons on *(name of individual)* , who is designated by law to accept service of process on behalf of *(name of organization)*; or
- ☒ I returned the summons unexecuted because **Other contact after attempting service at 1207 13th St, Imperial Beach, CA 91932**; or
- ☐ Other *(specify)*

My fees are \$ 0 for travel and \$ 75.00 for services, for a total of \$ 75.00.

I declare under penalty of perjury that this information is true.

Date: 07/30/2024



Server's signature

Alejandra Salcido

Printed name and title

**602 myra avenue
chula vista, CA 91910**

Server's address

Additional information regarding attempted service, etc:

7/29/2024 3:19 PM: I was unable to deliver the documents due to a hostile environment.



Tracking #: 0139076338



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MARK ANTHONY ORTEGA

Plaintiff,

v.

CARLOS HERRERA AND FUNDCUBE INC.
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Defendants.

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[PROPOSED] ORDER ON PLAINTIFF'S MOTION FOR ALTERNATIVE SERVICE

CAME ON TO BE CONSIDERED Mark Anthony Ortega's Motion For Alternative Service and after considering said motion, as well as the supporting Exhibits, the court finds Plaintiff's attempts to serve Carlos Herrera and Fundcube Inc. D/B/A FundQube ("Defendants") have been unsuccessful and find the Alternative Service requested in Plaintiff's motion will be reasonably effective to give Defendants notice of the suit.

Therefore, the Court GRANTS the motion and authorizes Alternative Service on Defendants by the following method:

- a. By Affixation of a copy of the Summons, Complaint, and this Order to the gate at
1207 13th ST, Imperial Beach, CA 91932

The above described method is reasonably effective to give Defendants notice of the suit and such service shall be deemed effective as of the date of compliance by Plaintiff.

Signed on _____, 2024.

JUDGE PRESIDING

Mark Ortega
PO Box 702099
San Antonio, TX 78270



San Antonio, TX 78207

RECEIVED

AUG 15 2024

CLERK, U.S. DISTRICT COURT
BY
WESTERN DISTRICT OF TEXAS

DEPUTY CLERK

U.S. District Clerk's Office
262 West Nueva Street, Room 1-400
San Antonio, Texas 78207

CV-9